2022AP1030, 2022AP1290, 2022AP1423

In the State of Wisconsin Court of Appeals, District II

American Oversight,
Petitioner-Respondent,
v.
Assembly Office of Special Counsel,
Respondent-Appellant,

Robin Vos, Edward Blazel and Wisconsin State Assembly,
Respondents

On Appeal from Circuit Court for Dane County
Case No. 2021CV003007, Honorable Frank D. Remington, Presiding

Reply Brief of Respondent-Appellant Assembly Office of Special Counsel and Appellants James Bopp, Jr., Courtney Turner Milbank, Joseph Maughon, Cassandra Dougherty, J Michael Massie, and Michael D. Dean

Michael D. Dean, SBN 01019171
MICHAEL D. DEAN, LLC
PO Box 2545
Brookfield, WI 53008
Telephone: (262) 798-8044
Wisconsin Local Counsel

James Bopp Jr, Ind. Bar #2838-84*
Courtney Turner Milbank,
Ind. Bar #32178-29*
Joseph D. Maughon, Va. Bar # 87799*
Cassandra Dougherty, Ca. Bar #336487*
THE BOPP LAW FIRM, PC
The National Building
1 South 6th Street
Terre Haute, Indiana 47807
Telephone: (812) 232-2434
Facsimile: (812) 235-3685
Lead Counsel
*Admitted pro hac vice

Facts

A. Contempt Proceedings

Assembly Office of Special Counsel ("**OSC**") briefly summarizes relevant facts relating to the contempt issues that are either agreed upon or undisputed.[1]

1. Modify Motion, Voluntary Production of Omitted Documents, and Prima Facie Finding.

The circuit court ordered production of responsive documents by 1/31/22, for *in camera* review. Opening Brief of Respondent-Appellant Assembly Office of Special Counsel and Appellants James Bopp, Jr., Courtney Turner Milbank, Joseph Maughon, Cassandra Dougherty, J Michael Massie, and Michael D. Dean ("**OSC Br.**"), 30, Brief of Petitioner-Respondent American Oversight ("**Resp.**"), 21. OSC complied, producing 761 pages. OSC Br., 31; Resp., 26. The court found none of OSC's documents were exempt from disclosure, releasing them to AO on 3/8/22. OSC Br., 31; Resp., 24–26.

Thereafter, American Oversight ("**AO**") identified certain documents OSC omitted and noted several emails OSC produced were missing attachments. OSC Br., 31; Resp., 26.[2] OSC immediately and voluntarily provided the documents in its possession ("**Contracts and Calendars**")[3] on 4/8/22. OSC Br., 31; Resp., 27. AO doesn't dispute that OSC committed to recovering the documents no longer in its possession ("**Attachments**")[4] by contacting persons in the e-mails and asking

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[1]Some remaining disputes are clearly noted. *See, e.g.*, n.7.

[2]OSC maintains this omission was inadvertent. *See, e.g.*, OSC Br., 31, 69 n.29. AO admits that OSC stated its omission was inadvertent. Resp., 27.

[3]AO disputes neither receipt, nor OSC's description, of these produced documents. *See* OSC Br., 31–32, 70; *see generally* Resp. Nor does AO dispute these were the first category of documents referenced by the court in its prima facie finding. *Infra* p. 3.

[4]OSC compiled responsive documents for production and then deleted the electronic copies. Exhibit B to Affidavit of Christa O. Westerberg, ("**Westerberg Exhibit B**"), R. 200:6–7; Resp.,

them to re-send the Attachments. OSC Br., 32, 32 n.10. AO doesn't dispute OSC fulfilled its commitment, securing and producing the recovered Attachments on 5/13/22, nor that the production was e-filed before the contempt hearing.[5] [6] OSC Br., 32 n.10, 70; Affidavit of Courtney Turner Milbank and Exhibits A–B, Rs. 261–297.

Despite OSC voluntarily producing all documents in its possession, AO filed a Motion to Reopen and Modify the Court's Order ("**Modify Motion**"), R. 194, on 4/20/22, which the court characterized as a motion for contempt. OSC Br., 68; Resp., 27–28.[7] Simultaneously, and without allowing for any response by OSC, the court found AO had made a prima facie case of contempt. OSC Br., 32, 69–70; Resp., 28.

It's undisputed that the court made explicitly clear that AO's prima facie case was limited to two categories of documents: (**1**) documents that were omitted and "have since been produced" (the Contracts and Calendars) and (**2**) certain documents that were omitted and "have since been destroyed or deleted[]" (the Attachments). OSC Br., 69–70 (citing 4/26/22 Hr'g Tr., R. 324:23:16–23). The burden thus shifted to OSC to prove it wasn't in contempt. *Id*.

OSC intended to call Zakory Niemierowicz ("**Niemierowicz**") as its sole witness. OSC Br., 32; Resp., 29. It's undisputed that OSC's Opposition detailed

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27. There is no dispute that this deletion occurred before this case and before the court's production order. OSC Br., 31–32, 70. Accordingly, OSC maintains the Attachments couldn't be subject to the production order. *Id*.

[5]The only Attachments not recovered were OSC's interim report drafts, but the final version was already publicly available. OSC Br., 32 n.10. This is undisputed.

[6]AO doesn't dispute that these Attachments were the second category of documents referenced by the court in its prima facie finding. *Infra* p. 3.

[7]There is a dispute over whether this characterization was proper. *See infra* Part I.C.1. OSC maintains it wasn't. *Id.*

various facts it would "present at the hearing." OSC Br., 71 (citing Response in Opp'n to Motion to Modify ("**Modify Opp'n**"), R. 225:2); *see generally* Resp.

It's also undisputed Niemierowicz was the person who actually performed the searches.[8] OSC Br., 32, 71, 71 n.32.

2. Perceived Threat of OSC Witness

The parties agree that the court made certain comments during a hearing on 6/8/22, two days before the contempt hearing, including discussion of potential conflicts of interest, "incarceration" and "confinement in the Dane County Jail." OSC Br., 33; Resp., 30–31. While the parties dispute the meaning and effect of these comments,[9] both agree Niemierowicz declined to appear because of them. OSC Br., 33; Resp., 32.

Nor does AO dispute that OSC's counsel was informed after 6:00 PM on 6/9/22 that Niemierowicz wouldn't appear at the hearing the next morning because of the court's comments. OSC Br., 33; Resp., 32. It's undisputed that OSC sought a continuance on that basis, had no other witnesses to testify, and made clear that it was unable to present its case-in-chief. *Id*. Likewise, it's undisputed that AO was permitted to present additional evidence[10] and hadn't moved to reopen its case in chief. OSC Br., 35; Resp., 79–82.

3. Contempt Order

The court found OSC in contempt and issued remedial sanctions of $2,000 per day. OSC Br., 35; Resp., 34. The purge conditions required Gableman to submit an affidavit detailing the steps he took to comply. OSC Br., 35, 79; Resp., 34.

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[8]AO only disputes the "importance" of Niemierowicz's testimony. *Infra* Part II.B.1.

[9]*See infra* Part I.C.2.

[10]Though AO disputes this was improper. Resp., 79–82.

It's undisputed the purge conditions were directed to Gableman,[11] that Gableman had delegated the prior searches and production to Niemierowicz, and that Gableman didn't personally perform the initial searches. OSC Br., 80. It's also undisputed that Gableman's Affidavit corroborated that all documents had already been produced. OSC Br., 81; Resp., 37, 78.

B. AO's Facts Omit Necessary Citations to the Record, Mischaracterize Facts, and Included Irrelevant Facts Yet Omitted Relevant Ones.

AO claims OSC's facts "contain[] significant omissions[,] gloss[] over portions . . . and ignore[] important context[,]" Resp., 16, but fails to identify *which* of OSC's facts do this. OSC maintains it complied with Wisconsin law.

Wis. Stat. Rule 809.19(1)(d) provides a brief must contain "a statement of facts relevant to the issues . . . , with appropriate references to the record." OSC has done this. Of course, OSC didn't recount every single fact (which covered nearly a year of proceedings, dozens of briefs and motions, and hundreds of pages of transcript), but included all relevant facts and record citations.

On the contrary, AO didn't comply with Wis. Stat. Rule 809.19(1)(d). It omitted necessary citations, mischaracterized facts, and included irrelevant facts yet omitted relevant ones.

1. AO Frequently Omitted Necessary Citations.

AO's Facts omit appropriate references to the record; specifically, AO omits citations in at least thirty sentences. *See, e.g.*, Resp., 26, Section II.F. (making at least eight uncited and therefore unsubstantiated claims regarding its review of the responsive records).

This omission of citations improperly burdens this Court. *Weiland v. Paulin*, 2002 WI App 311, ¶ 11, 259 Wis. 2d 139, 147, 655 N.W.2d 204, 208 ("An

[11]AO argues they were directed to Gableman in his official capacity. Resp., 85. This is incorrect. *Infra* Part I.B.3.

appellate court is improperly burdened where briefs fail to consistently and accurately cite to the record." (citation omitted) (reversed on other grounds)).

2. AO Frequently Mischaracterized Facts.

AO also frequently mischaracterized facts. OSC notes just a few examples, of many.

First, AO posits that "Attorney Bopp continually spoke over the court[.]" Resp., 28. While Attorney Bopp did inadvertently speak over the judge once during one hearing, OSC Br., 132 (making clear this wasn't intentional), he didn't *continually* do so. Additionally, AO omits important context: it was a Zoom hearing, where it's all too common for participants to inadvertently speak over each other because of dynamics of that technology, and even the court itself had technological problems or didn't hear responses during Zoom hearings. *Id.*; *id*. at 132 n.70.

Second, AO states Niemierowicz didn't attend the contempt hearing because of the court's comments "regarding a potential conflict of interest[.]" Resp., 32. This is a gross mischaracterization of why Niemierowicz didn't appear. There is no evidence in the record that anyone, let alone Niemierowicz, ever took issue with the court's conflict of interest comments. Niemierowicz took issue only with the "incarceration" and "spontaneous[]" "confinement in the Dane County jail" comments, which he perceived as a threat. *Infra* Part I.C.2; 6/8/22 Hr'g Tr., R. 314:47:4–20, R-App. 251:4–20.

3. AO Cited to Irrelevant Facts Yet Omitted Relevant Ones.

AO provides numerous irrelevant facts (including whether AO is a nonpartisan organization, Gableman's comments during a hearing (which are not at issue), and Niemierowicz's graduation year, title, other responsibilities). *See e.g.*, Resp., 17, 33–34, 91. But AO omits significant relevant facts, such as the court's limiting its prima facie finding to two document categories, OSC's voluntarily producing the

Attachments to AO on 5/13/22, and the court's *sua sponte* calling a witness and conducting the direct examination for AO. OSC Br., 69–70, 76 n.34.

Argument

I. Issue 2: The Circuit Court Erred in Finding OSC in Contempt and in Imposing Remedial Sanctions.

AO claims that most of OSC's arguments are "about the [] court's case management decisions[.]" Resp., 73. This is incorrect. OSC argues there was no continuing contempt to terminate, as all documents that were inadvertently omitted were voluntarily produced before the contempt finding. *Infra* Part B; *see generally Christensen v. Sullivan*, 2009 WI 87, 320 Wis. 2d 76, 768 N.W.2d 798. It also argues that the court made numerous other errors. *Infra* Part C. None of OSC's arguments are about the court's case management decisions.

A. AO Ignores That Remedial Sanctions May *Only* Be Imposed If Contempt Is Continuing.

The parties agree the standard of review is "plain instance of mistake or abuse of discretion[]" and contempt requires intentional conduct. Resp., 73–74 (citing *Currie v. Schwalbach*, 132 Wis. 2d 29, 36, 390 N.W.2d 575, 578 (Ct. App. 1986)); OSC Br., 67 (same). However, AO ignores that contempt must also be continuing.

As OSC explained, a remedial sanction isn't designed to punish, but to force a contemnor into compliance. OSC Br. 67 (citing *Christensen*, 320 Wis. 2d at 102–103). Accordingly, remedial sanctions are only appropriate to "terminat[e] a *continuing* [or ongoing] contempt of court." *Christensen*, 320 Wis. 2d at 81–82 (emphasis in original) (citation omitted).

B. The Circuit Court Erred in Finding Contempt of Court.

1. OSC Voluntarily Cured Any Deficiencies Before the Circuit Court's Contempt Order.

AO seems to misunderstand OSC's contempt arguments, claiming that OSC argued that the contempt order was improper because it later established, via

Gableman's affidavits, all documents had already been produced. Resp., 78. OSC never argued this. OSC argued it had voluntary cured any deficiencies *before* the court's contempt order.

As shown above, the allegations for contempt were based on two categories of documents: (**1**) the Contracts and Calendars and (**2**) the Attachments. *Supra* p. 3.[12] These were produced on 4/8/22 and 5/13/22, respectively, and e-filed with the court. *Supra* pp. 2–3. Production of the same is undisputed. Thus, both sets of documents, which formed the basis of the contempt motion, were voluntarily produced before the contempt hearing.[13]

2. AO Still Doesn't Dispute OSC's Voluntarily Remedy.

AO doesn't dispute OSC voluntarily remedied the deficiencies prior to the court's contempt order. Instead, AO says "OSC's argument that the circuit court 'erroneously used OSC's voluntary remedy[] . . . []as evidence' is meritless." Resp., 82 n.25.

This should fully resolve the issue of contempt. As shown, there were two categories of documents at issue, as made explicitly clear by the court; OSC voluntarily remedied those deficiencies by producing the documents *prior* to the court's contempt order. *Supra* Part I.B.1. Accordingly, there was never any continuing contempt to remedy.

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[12]OSC conceded the prima facie finding. Resp., 77; *see also* OSC Br., 70 n.31. OSC didn't provide the facts surrounding the improper prima facie finding to re-litigate the issue, but to give important context.

[13]OSC simply used Gableman's affidavit to corroborate "that it had produced all responsive documents[,]" Resp., 78, before the contempt hearing. OSC Br., 81.

3. The Circuit Court Also Issued Erroneous "Remedial" Sanctions.

AO argues the purge conditions were proper. Resp., 85. They weren't, as they weren't within the power of the contemnor, nor related to the contempt. OSC Br., 79–80.

AO argues the purge conditions were to "Gableman in his capacity as Special Counsel, not as 'an individual[.]'" Resp., 85. This is false. The purge conditions were neither directed to OSC, nor the "special counsel," nor to Gableman "in his official capacity." *See, e.g.*, OSC Br., 79; 8/16/22 H'rg Tr., R. 438:18:2–13; Decision and Order, June 15, 2022, R. 327:25, R-App. 107 (**Contempt Order**"). Instead, the purge conditioners were directed to "Mr." Gableman and detailed what "he" must do. *Id*. This was improper and not within the power of the contemnor, which was OSC, not Gableman as an individual. OSC Br., 79–80.

Moreover, the case for contempt was limited to two categories of records. *Supra* p. 3. Both categories were already voluntarily produced, so the purge conditions requiring Gableman to "go look again" for already produced documents wouldn't remedy any contempt. OSC Br., 80.

C. The Circuit Court Committed Numerous Other Errors in Finding OSC in Contempt of Court.

1. The Circuit Court Inappropriately Converted AO's Modify Motion into a Contempt Motion.

AO claims it "asked the [] court to initiate contempt proceedings and hold OSC in contempt[]" and the court didn't *sua sponte* convert its motion. Resp., 28 n.5. The issue with this is simple: AO never filed a motion for contempt.

A quick glance at AO's motion makes clear AO moved to reopen and modify, "pursuant to Wis. Stat. § 806.07(1)(h)." R. 194, 2. This isn't the statute for contempt. The motion provided no reference to contempt. *Id*. at 1–2. Neither the motion nor the accompanying brief contained *any* reference to relevant contempt

statutes or legal authorities, or argument as to why contempt would be appropriate. *See generally*, Modify Motion, R. 194; Br. in Support of Modify Motion, R. 196. AO simply said the court *could* or *should* consider contempt, Br. in Support of Modify Motion, R. 196, 8, 11–13, which is a far cry from making a motion to do so.

This Court has made clear that "[a]rguments unsupported by legal authority will not be considered, and we will not abandon our neutrality to develop arguments[.]" *Indus. Risk Insurers v. Am. Eng'g Testing, Inc.*, 2009 WI App 62, ¶ 25, 318 Wis. 2d 148, 170, 769 N.W.2d 82, 93 (internal citations omitted). Yet, that is exactly what the circuit court did by *sua sponte* converting AO's Modify Motion into a motion for contempt.[14] And then, the circuit court *sua sponte,* and without giving OSC the opportunity to respond, made a finding regarding contempt based on arguments never made by AO—that AO had made a prima facie case. 4/26/22 Hr'g Tr., R. 324:8:23–9:1, 23:16–21. AO didn't move for contempt under Wis. Stat. ch. 785, but the circuit court found OSC in contempt under Wis. Stat § 785.01. Contempt Order, R. 327, 1, R-App. 83. This was improper. In so doing, the court abandoned its neutrality.

2. The Circuit Court's Perceived Threat of OSC's Sole Witness Deprived OSC of its Ability to Make a Defense to the Contempt Motion.

AO continues to downplay the court's comments to Niemierowicz, arguing the court was simply "remind[ing] OSC's counsel of their ethical duties," Resp., 89, and the court's comments were "regarding a potential conflict of interest[,]" Resp., 32, 35–36.

[14]Whether OSC made a response to the contempt allegation or referred to it as a contempt motion *after* the court "*characterized*" it as such, 4/26/22 Hr'g Tr. R. 4:12–13 (emphasis added), doesn't negate the *sua sponte* conversion. *Contra* Resp., 76–77.

OSC has always been clear that the concerns about the court's comments during the 6/8/22 hearing weren't related to the court's conflict of interest comments, but, instead, always involved the court's perceived threat that Niemierowicz risked incarceration or spontaneous confinement in jail if he testified. OSC Br., 32–33, 71–73. AO even concedes, despite its efforts to downplay them, that the thrust of these comments was about "the potential consequences" (i.e., "confinement in . . . [j]ail") to Niemierowicz. Resp., 88 (citation omitted). This fact stands regardless of how it's labeled, and AO doesn't argue that Niemierowicz's perception was unreasonable.

Regardless, AO doesn't dispute that Niemierowicz didn't appear to testify because of the court's comments.[15] Resp., 33. Accordingly, regardless of the characterization, it was the court's comments that deprived OSC of its sole witness and precluded it from presenting a defense.

3. The Circuit Court Erroneously Used OSC's Voluntary Remedy as Evidence of a "Pattern of Continuing Contempt."

AO simply says "OSC's argument that the [] court 'erroneously used OSC's voluntary remedy'—producing records only after [AO] discovered they were missing—'as evidence,' is meritless[,]" Resp., 82 n.25 (citation omitted). But this proves OSC's point. After AO discovered some records were missing, OSC *produced the records*. OSC's desire and actions to remedy any deficiencies doesn't show an intentional and continuing violation. Instead, it shows a desire *to* comply.

Thus, any alleged contempt[16] ceased upon OSC's voluntary production of the omitted documents. The court's use of this voluntary production as evidence of a

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[15]Likewise, AO doesn't dispute imprisonment would have been inappropriate, irrational, punitive in nature, and disproportionate, nor that a contemnor is entitled to a meaningful hearing before being committed to jail. OSC Br., 72–73, 128 n.66.

[16]OSC doesn't concede any contempt in the first place, as its omissions were unintentional. OSC Br., 70, 74.

continuing pattern of contempt, rather than evidence of compliance, was erroneous. OSC Br., 74–75.

4. The Circuit Court Erroneously Relied on Faulty Evidence to Find a "Continuing" Contempt.

AO doesn't dispute only two categories of documents were at issue. Resp., 26–28. Nevertheless, it argues the court's reliance on four additional categories of evidence was proper. Resp., 79–84.

a. The Circuit Court Allowed AO to Improperly Put on Rebuttal Evidence.

AO cites no authority permitting it to re-open its case in chief (much less without moving to do so), but argues that even if its additional evidence was "rebuttal," it was proper. Resp., 79–80. This is inaccurate.

AO cites Wis. Stat. § 805.10 for the proposition that "[a]lthough OSC declined to present any evidence at the June 10 hearing[,]" "[t]he court [] properly exercised its discretion to permit American Oversight to present [] evidence . . . at the hearing." Resp., 80. However, Wis. Stat. § 805.10 has nothing to do with the presentation of *evidence* and whether rebuttal evidence can be presented, if the defendant presented no evidence in its case in chief, as happened here. This statute has to do with *argument*, not *evidence*, so it's irrelevant to AO's argument.

b. The Circuit Court Erroneously Relied on Records Not in OSC's Possession Until May to Find Contempt.

The court erroneously relied upon a document that OSC didn't have until 5/23/22, nearly eight months *after* the requests, to find OSC in contempt. OSC Br., 76. AO posits OSC had this document earlier, it was "maintained on [OSC's] own website[,]" and OSC should have produced it earlier. Resp., 81–82. This might sound damning until actual record evidence is considered.

First, OSC's website was and is https://www.wielectionreview.org. Gableman Aff., R. 350, 4 ¶ 27. The website AO discusses is www.wifraud.com—a website

created and maintained by a third-party, *not* OSC.[17] *Id*. at 4–5 ¶¶ 29–30. The owner and controller of the website didn't send the report to OSC until 5/23/22. *Id*. OSC then promptly produced it to AO. *Id*. at 5, ¶ 30; *see also* 6/10/22 Hr'g Exhibit 2, R. 321. Second, AO ignores that AO admitted *in the hearing* it didn't know when the document came into OSC's possession. 6/10/22 Hr'g Tr., R. 322:44:19–22. Third, AO argues OSC should have told the judge the report didn't come into its possession until later. But therein lies another issue with the court refusing the continue the contempt hearing (*see infra* Part II): OSC couldn't testify to when it received the document because its witness was absent, and the court refused to continue the hearing so OSC could present that witness.

c. The Circuit Court Erroneously Relied upon Citations to a Deposition, Which Was Not Properly Before the Court.

AO argues the court's use of Niemierowicz's deposition was proper under Wisc. Stat. § 804.07(1)(b). Resp., 82–83. AO is incorrect.

Niemierowicz wasn't an "officer, director, or managing agent," nor an employee of OSC, *see* Wisc. Stat. § 804.07(1)(b), but an independent contractor. Office of the Special Counsel Services Agreement, R. 262, 60, R. 263, 1 § (4)(A) ("The parties are independent contractors of each other for all purposes, and neither is an employee of the other[.]"). Nor was he designated under Wis. Stat. § 804.05(2)(e) or § 804.06(1) "to testify on behalf" of OSC. Wisc. Stat. § 804.07(1)(b).

Moreover, even if the statute did apply, it's undisputed the deposition wasn't admitted into evidence, OSC Br., 76, an adverse party never used the deposition,[18]

[17]OSC listed the website on various documents as a place to report fraud, *see, e.g.*, 6/10/22 Hr'g Exhibit 2, R. 321, 1, but didn't own or have access to the website, Gableman Aff., R. 350, 4–5 ¶¶ 29–30.

[18]Unless AO is arguing the court's use qualifies as use by an "adverse party," which supports the bias issue. OSC assumes AO doesn't rely on the court's use to trigger Wisc.

and AO made no application to do so, *id*. at 77. Accordingly, the court's reliance on it was improper.[19]

d. The Circuit Court Erroneously Relied on Silence of Witness.

Gableman invoked his right to counsel. 6/10/22 Hr'g Trans., 322:35:13–16 ("I want a personal counsel -- if you are putting jail on the table, I want a personal -- I want an attorney to represent me personally. I will not answer any more questions."); *see also id*. at 322:5:12–14. While he did say he had the right to be silent, he didn't say that right was invoked under the Fifth Amendment. *Id*. at 322:35:13–37:2. Thus, the court's "adverse inference" was erroneous. OSC Br., 78–79.

D. The Circuit Court Erred in Affirming the Prior Finding of Contempt and Imposing $24,000 in Remedial Sanctions.

Given the original contempt order was erroneous and all omitted documents were already produced *before* the contempt order, the court's order to pay sanctions of $24,000 was improper, as no sanctions were necessary to "remedy" a contempt. OSC Br., 81.

For these reasons, this Court should vacate the Contempt Order, R. 327, R-App. 82, and Decision and Order Finding the Assembly Office of Special Counsel Has Purged its Contempt, August 17, 2022, R. 424:3, R-App. 208 ("**Purge Order**") ($24,000 sanction).

II. Issue 3: The Circuit Court Erred in Refusing to Continue the Contempt Hearing.

OSC raises no issue about the court's "discretion to manage its docket and its courtroom," *contra* Resp., 39–40, but about the court's erroneous denial of a

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Stat. § 804.07(1)(b).

[19]AO also repeats the court's findings but doesn't rebut OSC's clarifications. Resp., 82–84; *see, e.g.*, OSC Br., 77–78.

continuance, *due to the absence of OSC's sole witness*—which deprived OSC of its sole witness and ability to present a defense, and ultimately resulted in OSC being found in contempt. *See Bowie v. State*, 85 Wis. 2d 549, 556–57, 271 N.W.2d 110, 113 (1978).

A. Legal Standard

The parties agree the standard of review is abuse of discretion. Resp., 87–88; OSC Br., 81. However, AO fails to acknowledge the factors a court must consider for "a motion for a continuance due to the absence of a witness." OSC Br., 82 (citing *Bowie,* 85 Wis. 2d at 556–557). These factors are "whether the testimony of the absent witness is material, whether the moving party has been guilty of any neglect in endeavoring to procure the attendance of the witness, and whether there is a reasonable expectation that the witness can be located." *Id*.

Neither the court, nor AO, addressed any of these factors. Failing to do so and denying the continuance was an abuse of discretion.

B. The Court Should Have Granted OSC's Request for Continuance.

1. Niemierowicz's Testimony Was Material.

AO doesn't argue Niemierowicz's testimony wasn't material, thereby conceding this factor. Resp., 91. Instead, it argues OSC "inflates the importance" of his testimony. *Id*. However, the question isn't the testimony's importance,[20] but whether it is material.

An absent witness's testimony is material if he is "the only one[] who can give such evidence and [his] testimony would not be merely cumulative." *Elam v. State*, 50 Wis. 2d 383, 390, 184 N.W.2d 176, 180–81 (1971). Niemierowicz's testimony was material. He was OSC's *sole* and *chief* witness. OSC Witness List, R. 224. He performed the actual searches and production, and was the only one with first-hand

[20]OSC, nevertheless, maintains Niemierowicz's testimony was of the utmost importance. *See, e.g.*, OSC. Br., 32.

knowledge and "the person most knowledgeable of the requests, searches, production, and office procedures regarding records requests." OSC Br., 71 n.32. OSC made clear it couldn't present a defense without Niemierowicz. *Id*. at 82.

Accordingly, Niemierowicz was the *only* person who could testify to what OSC did in response to the records requests, and the testimony wouldn't have been cumulative, as no other person had that information. 6/10/22 Hr'g Tr., R. 322:5:20–22, 322:7:4–8, 13:4–22, R-App 257:20–22, 259:4–8, 265:4–22; *see also* Gableman Affidavit, R. 350, 2–3 ¶¶ 12–15.

Moreover, AO's discussion of (for example) Niemierowicz's graduation year, title, and other responsibilities, Resp., 91–92, is irrelevant to whether his testimony was material, and only confuses the issues.

2. OSC Was Not Guilty of Any Neglect in Endeavoring to Procure Niemierowicz's Testimony.

AO doesn't argue OSC was guilty of any neglect, Resp., 88–92, conceding the issue. Instead, it argues Niemierowicz's absence wasn't the court's fault. *Id*. at 89–90.

First, no one alleges OSC was neglectful. While this should resolve the issue, OSC also provides that it fully prepared for Niemierowicz's testimony, listed him as its sole witness, supplied him for a deposition, and worked with him to provide the court with the "facts that OSC would 'present at the hearing.'" OSC Br., 71 (citing Modify Opp'n, R. 225:2). It wasn't until after business hours the night before the hearing that OSC was informed Niemierowicz wouldn't appear. OSC Br., 71. OSC wasn't neglectful.

Second, this factor doesn't consider whose fault the absence was. It isn't dependent on resolving whether the court threatened OSC's witness, or whether Niemierowicz's perception of the comments was justified. It's undisputed that Niemierowicz refused to appear "in light of the Court's comments[,]" Resp., 32,

showing OSC wasn't responsible for Niemierowicz's absence, and certainly wasn't neglectful.

3. There Was Reasonable Expectation That Niemierowicz Could Be Located.

It's undisputed that Niemierowicz could be located, as he still worked for OSC and could have been subpoenaed.

4. The Request for Continuance Was Timely.

AO argues OSC's motion was untimely. Resp., 89. But AO doesn't include that the perceived threat occurred just 48 hours before the hearing and that OSC wasn't advised until after business hours *the night before the hearing* that Niemierowicz was declining to appear. OSC Br., 83. OSC made the motion at the first opportunity thereafter—the very next morning at the beginning of the contempt hearing. *Id.* at 82. This complies with precedent. *Noack v. Noack*, 149 Wis. 2d 567, 572–73, 439 N.W.2d 600, 602 (Ct. App. 1989) (a party "may arrange for a continuance" due to "unexpected situations . . . that are beyond control[.]"). An unexpected situation arose that was beyond its control, so OSC timely attempted to arrange for a continuance.

5. There Was No Detriment to AO or the Public, as All of the Records Had Already Been Produced.

AO argues the public had a right to see records, Resp., 89, but fails to acknowledge that *all* records had *already* been produced to AO. Purge Order, R. 424:2, R-App. 207; Gableman Aff., R. 350. Accordingly, the continuance would have caused no detriment.

Thus, the circuit court abused its discretion by (**1**) failing to consider any of the relevant factors, which all favored granting OSC's request for continuance, and (**2**) by denying the continuance. As a result, this Court should vacate the Contempt

Order, R. 327, R-App. 82, and Purge Order, R. 424:3, R-App. 208 ($24,000 sanction).

III. Issue 4: The Circuit Court Erred in Declining to Recuse.

This Court should find Judge Remington erred in declining to recuse because he demonstrated bias or the appearance thereof requiring recusal, and because he didn't make the required determination on bias and the appearance thereof.[21] *See* Wis. Stat. § 757.19(2)(g) and SCR 60.04(4).

A. Legal Standard

Three tests are relevant to recusal: (**1**) Wis. Stat. § 757.19(2)(g)'s objective test ("**Statutory Objective Test**")[22] and (**2**) subjective test ("**Subjective Test**"), which requires "actually ma[king] [a] . . . determination" regarding bias and appearance of bias ("**Appearance**"), *State v. Pinno*, 2014 WI 74, ¶ 93, 356 Wis. 2d 106, 850 N.W.2d 207; and (**3**) SCR 60.04(4) ("**SCR Test**"), which requires recusal when there is objective Appearance, OSC Br., 87–93.

1. The Subjective Test.

While AO admits the Subjective Test requires the "exercise of making a subjective determination" on bias and Appearance, and that an appellate court must determine whether the judge made the required determination, Resp., 92, 95 (citation omitted), it cannot account for the fact that "determine" *means* something,

[21]Because OSC's recusal arguments are limited to the actions and statements that demonstrate bias, rather than legal conclusions, OSC's dismissal of 2022AP636 doesn't affect this issue.

[22]OSC raised this test to preserve arguments, but was clear about current precedent, OSC Br., 86. OSC doesn't "invite[]" this Court "to disregard" same, *contra* Resp., 93. OSC focuses now only on the other two.

see, e.g., Resp., 96 n.28. Understanding the statute requires knowing what "determine," "bias"[23] and "appearance" mean.

a. "Determine" Has Meaning.

This test requires a judge understand the allegations, since a judge cannot make a "determination" regarding a matter he doesn't understand. *See Ozanne v. Fitzgerald*, 2012 WI 82, ¶ 17, 822 N.W.2d 67, 71 (Abrahamson, C.J., op., joined by Bradley, Crooks, JJ.) (one of two opinions in even split, finding, because the challenged Justice had "misconstrue[d] the allegations . . . , no one can conclude . . . [he] made the required [] determination," despite his no-bias declaration[24]); OSC Br., 88–90 (*e.g.*, evidence of actual bias or refusal to determine Appearance based on the totality of the circumstances suggests required determination wasn't made). For example, it would be difficult for a judge who had shown *actual bias* to determine he was impartial and wouldn't create Appearance, so a mere declaration of no bias would (in comparison) be weak evidence of the required determination.

It's precisely *because* an actual determination is required that reviewing courts decide "*objectively* whether the judge *actually made* the subjective determination," *Pinno*, 356 Wis.2d at 157 (emphasis added), not whether he simply *declared* so. Despite acknowledging this manner of review, Resp., 95, AO surprisingly asks this Court to reject objective considerations for *making* that decision. *E.g.*, *id.* (calling such criteria mere "graft[ing]"), 96 (similar: "transmut[ation]" of test), 96 n.29.

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[23]"Partiality" is used synonymously with "bias." *E.g.*, *Pinno*, 356 Wis. 2d at 157–58 (referring repeatedly to this statute's requirement as testing for "bias"); *State v. Walberg*, 109 Wis. 2d 96, 106–109, 325 N.W.2d 687 (1982) (using "bias" and "partiality" interchangeably).

[24]OSC, recognizing no opinion is binding in this split decision, cites it to further show a mere announcement doesn't irrebuttably prove the required determination. The present facts are distinct from *Ozanne*, as Judge Remington even more plainly demonstrated a failure to make the required determination.

AO doesn't explain why this Court should ignore relevant factors (other, tellingly, than "no bias" declaration). The factors raised by OSC are important considerations for this Court in objectively deciding whether the determination was made. AO's litany of insinuations that a reviewing court shouldn't base its decision on all relevant facts must be rejected.

b. "Bias" Is Legally Defined.

This test plainly requires that a challenged judge understand what constitutes bias under precedent, since a determination cannot be made without understanding what is to be determined. AO doesn't explain why, for example, evidence of acts explicitly constituting "actual bias" under Wisconsin law, OSC Br., 90, 95–100, wouldn't outweigh a "no bias" declaration in deciding whether the determination was made.

c. "Appearance" Is Legally Defined.

This test requires understanding what constitutes Appearance, such as it being defined by the totality of the circumstances. OSC Br., 88–89. AO's arguments here fail, as explained below.

i. § 757.19(2)(g) Requires Consideration of Appearance.

The Subjective Test is plain: a judge must determine whether there is Appearance, and recuse if so. AO fails to demonstrate that this is *not* required. *See* Resp., 97 (failing to explain why *State v. Rochelt*, 165 Wis. 2d 373, 477 N.W.2d 659 (Ct. App. 1991) ignored mandatory Appearance determination, if not for the reasons OSC explained, OSC Br., 89; arguing from *Pinno*'s *Rochelt* citation, but omitting that its immediate context recites precisely what OSC has argued: recusal is required if the judge "'determines . . . *it appears he . . . cannot*[] act'" impartially, 356 Wis.2d at 157 (emphasis added) (citation omitted)).

AO also alludes to *State v. American TV & Appliance of Madison, Inc*., Resp., 97, but that case explicitly found an absence of proof of Appearance, 151 Wis. 2d

175, 188–89, 443 N.W. 2d 662 (1989), so no evidence could have outweighed no-bias presumption. Moreover, AO concedes that *State v. Carviou*, 154 Wis. 2d 641, 643, 454 N.W.2d 562 (Ct. App. 1990), *explicitly* required an Appearance determination, Resp., 103.

ii. OSC Cited Ample Authority That Appearance Determination Is Required.

Failing to prove an Appearance determination is *not* required, AO inaccurately claims OSC cites only *Rochelt* to show it *is*. Resp., 97. In reality, OSC cited at least five additional authorities including the statute. OSC Br., 88–90.

Indeed, AO's argument is so strained that it contradicts itself. AO concedes *Carviou* "held . . . lacking" a bias determination for failure to consider Appearance, then shifts 180°, arguing *Carviou* requires only the "judge . . . determine[] *whether he cannot act in an impartial manner*," recanting of its concession.[25] Resp., 96–97 (emphasis added). AO's multiple mischaracterizations, inaccuracies, and about-face, show its argument's frailty.

iii. A Judge Cannot Ignore the Statute's Requirement.

AO argues recusal is required only "*if* a judge determines there is . . . impartiality or [Appearance]," Resp., 98, and the judge is thus not required to consider Appearance *at all*. By this construction, a judge could unfailingly avoid recusal by refusing to make *any* bias determination. But surely this statute wasn't intended to be vapor-thin. Nor do AO's cited cases support this. *See supra* Part III.A.1.c.i. (*American TV* explicitly found there was no Appearance—so no evidence could have outweighed no-bias presumption); *see also Storms v. Action Wisconsin Inc.*, 2008 WI 110, ¶ 26, 314 Wis. 2d 510, 754 N.W.2d 480 (noting that

[25]AO's inability to consistently account for *Carviou* is demonstrated by another inaccurate claim, that OSC argues "*Carviou* requires judges to make a special demonstration . . . ," Resp., 97 (citation omitted). OSC argued that *Carviou* shows an Appearance determination is required, not some "special demonstration." OSC Br., 89.

Court had previously assumed, "absen[t] [] any objection," the challenged judge had made required determination, thus indicating that—had appropriate argument been made—such assumption might be overcome).

iv. Appearance Determination Requires Consideration of the Totality of the Circumstances.

AO argues a judge need not consider the totality of the circumstances, claiming OSC cites no case raising this issue. Resp., 96. While this begs the question (which is what a reviewing court should do when a particular situation *does* arise[26]), AO is simply incorrect. *Carviou* required an Appearance determination, based on allegations that the judge had "creat[ed] a conflict, *or apparent conflict*, of interest," and hadn't addressed Appearance, 154 Wis. 2d at 643 (emphasis added); *see* OSC Br., 89; and AO never mentions *Walberg*, thus conceding it shows Appearance determination *requires* consideration of the totality of the circumstances, *id.* at 88 n.38.[27]

AO makes these many frail arguments that the Appearance requirement is meaningless, perhaps realizing it renders clear answers: (**a**) Judge Remington should have made a non-adversarial Appearance determination, OSC Br., 94, 117–19, (**b**) shouldn't have declined considering all circumstances, *id.* at 118–19, and (**c**) such determination would have required recusal, *id.*

d. Courts Consider All Relevant Evidence.

The decontextualized cases AO cites in contending the Subjective Test is "straightforward," requiring little consideration of evidence, Resp., 95 (citing *Pinno*, *Rochelt*, *State v. Carprue*, and *State v. Marhal*), fail to persuade. *Pinno*, 356

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[26] If no prior "cases . . . [have] raise[d]" a particular "red flag," the issue must nonetheless be addressed when it *does* arise. *Ozanne*, 2012 WI 82, ¶ 37 (Abrahamson, C.J., op., joined by Bradley, Crooks, JJ.).

[27] Nor does AO dispute that *American TV* shows the same. *Id.*

Wis.2d at 159, and *Rochelt*, 165 Wis. 2d at 379–80, made their own Appearance findings, so no evidence could show a failure to determine Appearance. *Rochelt*, *id.* at 378–79 and *Carprue*, 2004 WI 111, ¶¶ 30, 58, 274 Wis.2d 656, 683 N.W.2d 31, concerned *due process*,[28] and AO doesn't explain their relevance to statutory claims.[29] *Marhal*'s only alleged bias concerned juror comments the judge declined to consider, 172 Wis. 2d 491, 500, 506, 493 N.W.2d 758 (Ct. App. 1992), and trial counsel raised no bias claim*, id.* at 506, so it is not comparable.

None of these cases demonstrate courts must disregard evidence showing that a no-bias declaration "does not demonstrate that [the challenged judge] made the subjective determination required by Wis. Stat. § 757.19(2)(g)," *see Ozanne*, 2012 WI 82, ¶ 43 (Abrahamson, C.J., op., joined by Bradley, Crooks, JJ.).

e. *Ozanne* Justices Recognized Subjective Test May Have "Ironic" Results.

AO complains the Subjective Test can result in a "catch-22," Resp., 102–03, but this is no different than what three Justices recognized in *Ozanne* when noting the "iron[y]" that a challenged judge might avoid a reviewing court's conclusion of non-compliance by addressing the allegations in "generic[]," rather than specific, terms. 2012 WI 82, ¶ 36 (Abrahamson, C.J., op., joined by Bradley, Crooks, JJ.). If a reviewing court finds a challenged judge's response to recusal arguments shows he didn't make the required determination, then the court must consider that

[28]*Carprue* used Wis. Stat. § 757.19(2) to inform its due process analysis, but made no ruling concerning the statute, nor suggested an "infer[ence]" that a judge "consider[ed]" bias, *id.* at 684, could never be overturned. *See generally* 274 Wis.2d 656. Nor is mere consideration what is required, but a determination.

[29]*Carprue*'s facts also differ vastly from those here. While *Carprue* found there was neither "uncertainty" concerning the judge's propriety, 274 Wis.2d at 685, nor harm to the movant, *id.* at 686, OSC has shown an apparent anti-OSC motive for Judge Remington's bias, OSC Br., 101–05, and many anti-OSC predeterminations, guidance to AO, *id.* at 95–100, 105–110, and additional biased behaviors, including acts causing the non-appearance of OSC's witness, *id.* at 105, 110–17, all harming OSC.

evidence—as it would in any case. Whether a catch-22, ironic, or both, OSC is in good company in recognizing a challenged judge's response to the allegations might demonstrate non-compliance with the statute. It's odd AO faults OSC for this statutory potentiality.

2. SCR Test

Under *Pinno*, 356 Wis.2d at 158–159, the SCR Test is relevant to due process recusal claims. OSC Br., 93. AO points out (as OSC had noted) that *American TV* found the Judicial Code inapplicable to its *statutory* analysis, Resp., 99; *see* OSC Br., 91, but doesn't show that this affects the Judicial Code's relevance to *due process* claims, *id.* at 91–93. *American TV* never mentions due process.[30] *See generally* 151 Wis. 2d 175. By failing to argue that *American TV* applies to due process claims, AO concedes it doesn't. *American TV* is thus irrelevant to due process.

AO's attempts to distinguish *Pinno* similarly fail. *Pinno* addressed a legal recusal claim, yet AO suggests its analysis of the Judicial Code doesn't indicate the code is relevant to such claims. Resp., 99–100. It's inconceivable that the Supreme Court would spend not just one sentence or paragraph, but more than a page on an irrelevant analysis, *see Pinno*, 356 Wis.2d at 158–161. This is especially true since the Court "decide[s] cases on the narrowest possible grounds," *State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997); and since *Pinno* nowhere indicates skepticism about the Judicial Code's applicability, *see generally* 356 Wis.2d 106.

AO again turns to mischaracterization. OSC never asked this Court to "change the law," *contra* Resp., 100, since the Judicial Code is *already* applicable to due

[30]For this reason, AO's citation to an unpublished decision, Resp., 100, is equally irrelevant, since *In re Sydney E.J.* found only that *Pinno* didn't change *American TV*'s framework, Resp., 100. This is so because *Pinno* addresses the due process recusal framework; *American TV* did not.

process recusal claims. AO fails to argue it's *not* applicable to *those*, thus conceding it is. OSC's disinclination to speculate *why Pinno* determined the Judicial Code was applicable, rather than resting on what the Supreme Court said, doesn't mean its argument is undeveloped. *Contra* Resp., 100–01.

OSC has shown that common law due process is applicable here, citing two Supreme Court cases recognizing same, and *Pinno*'s discussion of due process's applicability to recusal claims. OSC Br., 92–93. So AO's claims that OSC provided no precedent and this would change the law, Resp., 100, are incorrect.

AO hasn't shown the Judicial Code is not applicable to legal recusal claims under due process analysis.

3. OSC Suggests Appropriate Remedies.

Despite leaning heavily on *American TV*, AO *rejects* its remedy: in discussing the contention "that [a Justice] was disqualified under sec. 757.19(2)(g)[,]" the Court notes that if a judge participates despite being "disqualified by law . . . the court's decision would be void." 151 Wis. 2d at 180–81; *see also infra* Part III.B.4.c. (bias, a structural error, cannot be harmless). So the remedy OSC seeks, far from being "excessive," Resp., 103, is simply what the law requires. AO fails to make a cogent argument it isn't.

B. Recusal Was Required.

Given the legal standards adduced above, AO casts no doubt on the conclusion that the law required Judge Remington's recusal.

1. AO Concedes Many Examples of Bias.

OSC detailed numerous examples of bias, several of which AO hasn't disputed. *See* OSC Br., 94–119. Thus, even if AO were correct in its arguments regarding various particular examples, Resp., 104–12, OSC has still shown that Judge Remington demonstrated bias or Appearance requiring recusal.

AO doesn't dispute that the coup de grâce of Judge Remington's biased behaviors—his threatening language toward OSC's sole witness, elision of same, and denial of a continuance when he didn't appear—showed grave bias.[31] It thereby concedes OSC's contentions on the single most bias-demonstrating events of the case. It also fails to dispute that Judge Remington explicitly neglected to consider the totality of the circumstances to determine Appearance. *Infra* Part III.B.2. It doesn't dispute Judge Remington: predetermined jurisdiction, OSC Br., 95; predetermined to find OSC in contempt, *id.* at 98–99; summarily denied OSC's recusal motion, demonstrating predetermination bias or a strong appearance thereof, *id.* at 99–100; predetermined to revoke Bopp, Milbank, Maughon, Dougherty, and Massie's ("**BLF Attorneys**") pro hac vice admission, *id.* at 100; made various arguments and motions, *sua sponte*, for AO, *id.* at 105–09; called a witness and conducted direct examination for AO, *id.* at 106, 116; misstated evidence to the detriment of OSC (and made misstatements *about* those misstatements), *id.* at 110–13; improperly authenticated evidence for AO, *id.* at 116; and fixated on a minor typo and suggested that OSC had "scapegoat" motive, demonstrating a desire to denigrate OSC, *id.* at 117.

AO thus concedes OSC's characterization of the foregoing, all of which demonstrated bias or Appearance requiring recusal.

2. Judge Remington Didn't Determine Appearance.

AO doesn't show Judge Remington made the required Appearance determination. Although AO quotes him: "OSC does not meet its burden to

[31]Regardless of characterization, AO concedes the thrust of these comments concerned Niemierowicz's potential incarceration, and doesn't dispute Niemierowicz (OSC's sole witness) perceived them as a threat and, because of them, didn't appear, *supra* Part I.C.2, that Judge Remington hid his threatening comments via ellipses, or that the court denied a request for a continuance based on the witness's absence. Nor does AO argue it was unreasonable for Niemierowicz to perceive the comments as he did.

prove . . . [Appearance],” Resp., 101 (quoting R. 379 at 1–2, R-App. 109–10), an adversarial statement doesn't show a judge made the required determination. OSC Br. 87–88; *see supra* Part III.A.1.e. AO leans again on mischaracterization, saying, “OSC does not develop this critique beyond a limited footnote.” Resp., 102. But that footnote itself cites further discussion. OSC Br., 94 n.45 (citing OSC Br., Part IV.B.2. and 118 n.61). More broadly, AO fails to refute that determining Appearance requires consideration of all circumstances. *Supra* Part III.A.1.c.iv. Judge Remington explicitly refused to do so, OSC Br., 118; AO doesn't argue otherwise. So AO casts no doubt that he failed to make the required determination.

3. “Decisions” and “Reactions” Can Demonstrate Bias.

AO characterizes all the examples of bias as “decisions or reactions . . . ,” *e.g.*, Resp., 104 n.32, but this is naive—everything a judge does falls into those categories. The question isn't whether the judge performed his duties, but whether his *manner* of doing so demonstrated bias. Regardless, AO specifies no OSC-cited example of bias constituting a “substantive decision[],” Resp., 105, nor can it, since OSC doesn't argue bias related to any legal conclusions, *supra* n.21.

4. OSC's Arguments Fairly Characterize the Facts.

AO alleges OSC mischaracterizes numerous matters, Resp., 105, but it fails to identify a single actual mischaracterization.

a. Judge Remington Misstated Evidence.

OSC has shown Judge Remington frequently misstated evidence to OSC's detriment. OSC Br., 110–13. Indeed, the bias demonstrated by his elision of his threatening language toward OSC's witness in his Recusal Order, OSC Br., 105, isn't contested. *Supra* n.31.

AO attempts to defend a different elision, the court's statement that OSC claimed it “delayed filing . . . per local rules.” Resp., 105 n.33 (citation omitted). What OSC had cited was the requirement to “*discuss resolution* per local rules.”

OSC Br., 112 (citation omitted). It's plain that Judge Remington transformed the meaning of OSC's argument, tarnishing OSC.

b. OSC Noted Only What a Reasonable Observer Could Conclude.

AO claims OSC "gratuitously . . . disparage[d] the circuit court," Resp., 104, but cites no example. Elsewhere, AO claims OSC "impugn[ed] the integrity of a judge," *id.* at 109, but as AO observes, OSC did *not* speculate about Judge Remington's motives, but only about what "a reasonable observer could conclude," *id.* (quoting OSC Br., 103–04). Notably, it was Judge Remington's own suggestion that a recusal argument must identify motive that this section of OSC's brief addressed. OSC Br., 94. So this wasn't "gratuitous"—Judge Remington *invited* it. And while movants must explain their reasoning, OSC (far from cavalier) ensured that it discussed only what *could* be concluded and how those conclusions relate to legal requirements.

c. OSC Cited All Relevant Context and Fully Developed Its Arguments.

AO claims two of OSC's arguments fall short on facts or argument. But OSC doesn't "omi[t]" what AO says it does. *Compare* Resp., 105 (alleging OSC "omits" R. 322 at 32–37) *with* OSC Br., 35 (citing 6/10/22 Hr'g Tr., R. 322:32:11–37:5), 101 (citing R. 327:19–23, R-App. 101–105, Order addressing Gableman's conduct[32]). AO hints Judge Remington's treatment of Gableman was warranted, Resp., 106, but even if AO had developed this argument that such lack of judicial restraint is warranted, this fails to address the question, which is whether it was part of a larger pattern showing Judge Remington's contempt for

[32]Although AO bizarrely rests its argument on OSC's Appendix, Resp., 105–06, this Appendix citation shows that OSC included the order addressing the matter. So AO's suggestion of Appendix insufficiency is both novel and misguided.

OSC. And AO doesn't address OSC's numerous other examples of disdain for OSC, OSC Br. 101–05, therefore conceding they show unnecessary harshness.

AO claims OSC "does not argue" prejudice from Judge Remington impeding OSC from making its record, OSC Br., 113–16. Resp., 106.[33] This is incorrect, *see, e.g.*, OSC Br., 113, and demonstrates a basic misunderstanding: recusal is required when (for example) predeterminations, combined with antipathy toward "counsel's . . . motions and . . . objections," "create [Appearance]," *Walberg*, 109 Wis. 2d at 108. And bias—a "structural error," *In re Paternity of B.J.M.*, 2020 WI 56, ¶ 35, 392 Wis. 2d 49, 944 N.W.2d 542—*shows* prejudice, tainting the whole trial, and *cannot* be harmless. *Pinno*, 356 Wis.2d at 135–136. AO again calls these actions mere docket control, Resp., 106, but doesn't explain how, "when taken together with the judge's entire course of conduct . . . , [they do not] create the appearance that the court was allowing its irritation with [OSC] to affect its impartiality . . . ," *Walberg*, 109 Wis. 2d 96, 108. Nor does it explain how docket control justifies repeatedly bucking a particular party's efforts to make a record.

d. Judge Remington Made Improper Predeterminations.

Regarding Judge Remington's predeterminations, AO essentially concedes Judge Remington did give it a roadmap to seek contempt, *see* Resp., 108; OSC Br., 98, since whether he believed there was noncompliance is irrelevant to whether the roadmap was given—which, among other things AO doesn't dispute, shows predetermination to find OSC in contempt, *id.* at 97–98.

AO posits there were no merits predeterminations at the 1/21/22 hearing because it concerned *in camera* review. Resp., 107. But that isn't logical. AO doesn't dispute *in camera* review applies only absent other exceptions, OSC Br.,

[33]AO also claims, without example, these instances "involved OSC's attorney talking over the court . . . ." *Id.* AO provides no evidence that this happened "frequently", *id.*, but just one time, unintentionally, *supra* Facts B.2.

96—so, absent careful review of full briefing[34] on exceptions, reaching *in camera* review implies Judge Remington *either* (a) bypassed necessary argument, or (b) predetermined those decisions. OSC has proven the latter. OSC Br., 96–97. While AO calls these determinations merely preliminary, Resp., 107, Judge Remington revealed they *were* final. In a ruling a few days later,[35] he called OSC's *statutory* argument "one already rejected by the Court[.]" R. 119, 2. This is the same sort of "explicit [] confirm[ation]" of predetermination condemned in *State v. Goodson*, 2009 WI App 107, ¶ 16, 320 Wis. 2d 166, 771 N.W.2d 385. That the order on the merits was momentarily stayed doesn't negate the predeterminations, *contra* Resp., 107–08.

e. AO Casts No Doubt On the Motive for Judge Remington's Bias or the Impropriety of His Demeaning Language.

AO fails to persuasively argue against OSC's demonstration of both the motive for Judge Remington's bias and the bias itself.

AO doesn't dispute that Judge Remington's aspersion that OSC "accomplished nothing," OSC Br., 101 (citation omitted), was irrelevant. Instead, it argues OSC's accomplishment (or not) of "certain tasks" *was* relevant. Resp., 109. But this doesn't address whether an evaluation of *the totality of OSC's accomplishments* was relevant. It wasn't: AO doesn't argue that any of the documents at issue, or even *all* of them, would have given any idea of the grand total of OSC's accomplishments, or that the documents at issue covered the entirety of OSC's

[34]AO notes "OSC had *already* briefed its motion to quash[,]" Resp., 107 (citing R. 99), but omits this was filed the day before the hearing and Judge Remington had, in his own words,"run[] through" OSC's brief "quick[ly]," needed "time to address these issues," and needed OSC's Reply. 1/21/22 Hr'g Tr., R. 148:62:10–22. This discredits AO's contention that he "was significantly familiar with OSC's arguments[.]" Resp., 107.

[35]Made before either party filed response (R. 125, 1/31/22) or reply (R. 150, 2/10/22) to OSC's Motion to Quash.

existence (they didn't), or that there is any rationale whatsoever suggesting a public records case is an appropriate forum to calculate an organization's success.

For the same reason, AO's argument that OSC's examples of demeaning language are "overstated," Resp., 110, fails. AO cites only one example—"Nothing in these particular records bespeaks any investigation . . . "—quibbling that this was relevant because OSC claimed the documents were investigatory, *id.* (citation omitted), but AO neither denied OSC was investigating nor claimed the requested documents were self-explanatory or constituted all documents OSC ever possessed. Moreover, WEC complaints, voter data, and a report about election funding—all produced, R. 423:41 n.13, 42, R-App. 155 n.13, 156—are what an election investigation would collect.

So AO's attempt to downplay the vitriolic nature of Judge Remington's comments is unsuccessful: it shows no basis for them. Indeed, the very case AO cites observes that judicial statements *may* "constitute . . . bias" if "they display a deep-seated . . . antagonism" rendering impartiality impossible, *Disciplinary Proc. Against Nora*, 2018 WI 23, ¶ 35, 380 Wis. 2d 311, 909 N.W.2d 155 (quoted source omitted) (cited at Resp., 110), as OSC has shown of Judge Remington's comments, OSC Br., 101–05.

f. Judge Remington Aided AO.

AO's denial that Judge Remington aided AO, Resp., 111, also fails. It again excuses this as docket control, *id.*, ignoring the *manner* thereof, *see supra* Part III.B.3. AO doesn't argue it's appropriate for a judge to guide a party on achieving service *and* produce an evidentiary hearing for that purpose (though the question was purely *legal*, OSC Br., 30 n.7), "forcing [OSC] to . . . concede jurisdiction," OSC Br., 106–07 (noting statement, "You can figure out what your next move is." (citation omitted)). Nor does AO explain what OSC "mischaracteriz[ed]," Resp., 111, presumably because OSC didn't. Instead, AO argues this wasn't advice. *Id.*

Regardless of semantic preference for describing such insinuations and acts, they plainly *did* aid AO.[36]

Similarly, AO's argument that OSC misleadingly describes Judge Remington's permitting AO to call a non-listed witness, since the record was "clear" the witness list order bound only OSC, Resp., 112, *ignores* the record. Judge Remington himself said OSC correctly interpreted the order, that it was inartfully drafted, the court's fault, and that OSC's arguments were accurate. 6/8/22 Hr'g Tr., R. 314:27:24–28:11. These four statements from Judge Remington himself show the record was *not* so clear. AO's argument that both OSC and the judge are incorrect strains credulity.

IV. Issue 5: The Circuit Court Erred in Revoking the Pro Hac Vice Admissions of Five BLF Attorneys.

The court's revocation of BLF Attorneys' pro hac vice admission wasn't justified by law or fact and was done without notice or an opportunity to respond, so this Court should vacate the revocation, Recusal Supp., R. 423:2–3, 86–90, R-App. 116–117, 200–204, and reinstate the admissions.

AO expresses no position on this issue. Accordingly, there is no dispute as to whether the revocation of BLF Attorneys' pro hac vices was justified. There is no dispute that BLF Attorneys have consistently demonstrated competency, knowledge, and skill; willingness to abide by the rules of professional conduct and decorum; and have employed the required "thoroughness and preparation reasonably necessary for representation." OSC Br., 121. There is no dispute that BLF Attorneys made arguments in good faith with a strong basis in law and fact,[37]

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[36]Regarding AO's assertion that OSC thus deems AO incapable of litigating without help, *id*., we note only that it's obvious fallacy to equate an observation that a judge aided a party, with a suggestion that it couldn't have proceeded otherwise.

[37]AO admits the court did call OSC's arguments "misstatement[s] and exaggeration[s,]" Resp., 21, contrary to the court's assertions that it didn't, OSC. Br., 126.

and complied with the law.[38] Further, there is no dispute the court failed to afford BLF Attorneys notice, opportunity to respond, or a hearing. *See* SCR 10.03(4)(e); Resp., 112–113; OSC Br., 134–135.

While AO argues this issue is moot, Resp., 113 n.40, BLF Attorneys have already established that it isn't, OSC Br., 120.

V. Issue 6: The Circuit Court Erred in Holding that OSC Attorneys' Conduct was Sanctionable.

The circuit court erroneously found OSC Attorneys'[39] conduct was sanctionable. *See* Wis. Stat. §§ 802.05(2), (3).

AO expresses no position on this issue. Accordingly, there is no dispute as to whether the court's finding was justified, or that the court made that finding without notice or an opportunity to be heard. Resp., 113; OSC Br., 135–137. Thus, the finding should be vacated. *See* Recusal Supp., R. 423:88–89, R-App. 202–203.

Conclusion

This Court should vacate Contempt Order, R. 327, R-App. 82; vacate in part the Purge Order, R. 424, R-App. 205; vacate the denial of OSC's request for continuance, 6/10/22 Hr'g Tr., R. 322:50-12–14, R-App. 273:12–14; vacate the Recusal Order, R. 379, R-App. 108, and order Judge Remington to recuse; and vacate the order revoking BLF Attorneys' *pro hac vice* admissions (and reinstate their admissions) and finding OSC Attorneys' conduct sanctionable, Recusal Supp., R. 423:2–3, 86–90, R-App. 116–117, 200–204.

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[38]AO admits the court instructed OSC to produce hard copies for *in camera* inspection, and the court stated it would file any documents it deemed should be released. Resp., 21, 23; OSC Br., 127.

[39]"**OSC Attorneys**" include BLF Attorneys and Michael Dean.

Respectfully submitted,

Dated: May 5, 2023

Electronically signed by:
/s/ Michael D. Dean
Michael D. Dean, SBN 01019171
MICHAEL D. DEAN, LLC
PO Box 2545
Brookfield, WI 53008
Telephone: (262) 798-8044
miked@michaelddeanllc.com
Wisconsin Local Counsel

Electronically signed by:
/s/ James Bopp, Jr.
James Bopp Jr, Ind. Bar #2838-84*
Courtney Turner Milbank,
Ind. Bar #32178-29*
Joseph D. Maughon, Va. Bar # 87799*
Cassandra Dougherty, Ca. Bar #336487*
THE BOPP LAW FIRM, PC
The National Building
1 South 6th Street
Terre Haute, Indiana 47807
Telephone: (812) 232-2434
Facsimile: (812) 235-3685
jboppjr@aol.com
cmilbank@bopplaw.com
jmaughon@bopplaw.com
cdougherty@bopplaw.com
Lead Counsel
*Admitted pro hac vice

Certificate of Compliance

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 9,491 words, calculated using the word count function of WordPerfect 2020.

May 5, 2023

Electronically signed by:

/s/ James Bopp, Jr.
James Bopp, Jr.